### United States Court of Appeals for the Second Circuit



# BRIEF FOR APPELLEE

## 76-7053

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CORRECTED

MIRIAM WINTERS, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

-against-

ALAN D. MILLER, M.D., individually and as Commissioner of Mental Hygiene of the State of New York; FRANCIS J. O'NEILL, M.D., individually and as Director of Central Islip State Hospital; Doctors H. BLANKFIELD, DUSAN KOSOVIC, SANDRA GRANT, GERALD OLLINS, CHRISTINE JORDAN, THOMAS DACORTA and CATHERINE DROMGOOLE and other doctors on the staffs of Bellevue Hospital and Central Islip Hospital whose names are unknown to plaintiff,

Defendants-Appellees.



BRIEF FOR STATE DEFENDANTS-APPELLEES

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BRIEF FOR STATE DEFENDANTS-APPELLEES

### Preliminary Statement

Plaintiff has appealed from an order of the United States District Court for the Eastern District of New York (Judd, J.) dated December 16, 1975 denying plaintiffs motion for a new trial and from an order of the United States District Court for the Eastern District of New York (Mischler, Ch. J.) dated March 1, 1977 denying plaintiffs second motion for a new trial. Plaintiffs first motion for a new trial followed a directed verdict in favor of defendants Miller and O'Neill and a jury verdict in favor of all the defendants. Plaintiffs second motion for a new trial was based on alleged loss of portions of the transcript.

### Questions Presented

- 1. Whether the jury verdict in favor of the four state defendants Miller, O'Neill, DaCorta and Dromgoole was clearly erroneous.
- 2. Whether Trial Court committed error in its jury charge and evidentiary rulings and assuming <u>arguendo</u> error was committed whether it was of such a nature to warrant reversal of the jury verdict.
- Whether the denial of plaintiff's second motion for a new trial was proper.

### Statement of Facts

Plaintiff who professes the religion of Christian Science was involuntarily committed to Bellevue Hospital in May, 1968. While at Bellevue she alleges she was administered medication despite her protests on religious grounds. Plaintiff was thereafter admitted to Central Islip State Hospital on the certificate of two physicians. Plaintiff was informed of her right to challenge that admission. A month after her admission plaintiff decided to become a voluntary patient and was later discharged. Plaintiff alleges that while at Central Islip she was also given medication despite her religious objections. The state defendants who were represented in this action were Dr. Dromgoole, Dr. DaCorta and Dr. Miller from Central Islip Hospital and the Commissioner of Mental Hygiene Dr. O'Neill. All these defendants were sued both individually and in their official capacities.

### Prior Proceedings

On July 3, 1969, plaintiff, a former patient at the Central Islip State Hospital, commenced an action against, inter alia, Alan D. Miller, M.D., then Commissioner of the New York State Department of Mental Hygiene.\* The

<sup>\*</sup>Commissioner Miller has since resigned his position.

complaint, as filed on July 3, 1969, requested five specific modes of relief in the <u>ad damnum</u> clause, including a claim for \$50,000 against all defendants. In identifying the parties, defendant Miller is identified only as the Commissioner of Mental Hygiene of the State of New York (Compl. ¶ 4). In addition the complaint names as parties (Compl. ¶ 7):

"There are other defendants, whose names are not presently known to plaintiff, all of whom are doctors on the staff of Bellevue or Central Islip who administered involuntary physical treatments to plaintiff."

The complaint set forth three claims which in sum and substance, allege that plaintiff during the period of time she was at Bellevue as an involuntary patient (May 2, 1968 - May 13, 1968) and at Central Islip (May 13, 1968 to June 18, 1968) and a voluntary patient at Central Islip (June 18, 1968 to July 18, 1968) medical treatment was administered to her by the Doctors there over her objections and clearly stated religious beliefs, causing her "great emotional and mental anguish, pain and suffering, indignity and humiliation and physical illness." As a second cause of action, she alleged that she had not been judicially

declared to be incompetent, and therefore was competent to make a determination as to whether or not to receive medical treatment. Finally, she alleged that involuntary fingerprinting and photographing over her objections violated her civil rights and also caused her great emotional and mental anguish, pain and suffering, and indignity and humiliation.

By motions dated September 12, 1969, the named defendants then, including defendant Miller, moved to dismiss the complaint on grounds of lack of jurisdiction and failure to state a claim for which relief can be granted. On November 21, 1969 the District Court (Travia, D.J.) rendered an opinion on cross-motions for summary judgment,\* dismissing the complaint in all respects. The opinion upon which the dismissal was granted is reported in 306 F. Supp. 1158.

<sup>\*</sup>Pursuant to Rules 12(b) and 56, F.R. Civ. P., defendants motions to dismiss were converted to motions for summary judgment.

An appeal was taken to this Court from Judge Travia's order, which on May 26, 1971, reversed, over the dissent of Judge Moore, the decision of the District Court and remanded "the case to the District Court with instructions that it proceed to trial on the merits." This opinion is reported at 446 F. 2d 65, 71. A petition for certiorari was denied. 404 U.S. 984 (1971).

Subsequently, discovery and pre-trial proceedings began. Upon request of defendants and over plaintiff's objections, the District Court ordered plaintiff to submit, pursuant to Rule 35, F.R. Civ. P., to a physical and medical examination. Thereafter plaintiff sought a writ of mandamus from this Court prohibiting the examination. On April 1, 1975, the writ was granted, and again the matter was remanded to the District Court. This decision is reported in 495 F. 2d 839.

On June 5, 1974, the Court (Judd, D.J.) held a pre-trial conference, resulting in the scheduling of depositions and setting a date for trial, November 4, 1974. On November 1, 1974, the deposition transcripts not having been received from the reporting service, one of plaintiff's

counsel contacted the District Court, and informed the court of the problem, and received the impression from the Clerk for Judge Judd that the matter would be rescheduled, and communicated this fact to defendants' counsel. Nevertheless, on the morning of November 4, 1974, Judge Judd, who had not in fact agreed to the adjournment of the matter, had the matter on the calendar. As plaintiff's counsel and counsel for the State defendants had not appeared, the matter was put over for the afternoon of that day, all counsel were apprised of Judge Judd's order and counsel appeared in the afternoon. At that time all counsel engaged in a colloquy in which plaintiff, in part was ordered to proceed to select a jury which plaintiff's counsel refused to do, and in which defendants set forth certain defenses, including the defense of official immunity as applied to defendants Miller and O'Neill. Because plaintiff refused to proceed to select a jury on November 4, intending to start the trial proper on November 5, 1974, the District Court refused to consider reopening the matter, and ordered the action dismissed.

A month later, plaintiff again moved to reopen the matter based apparently on Rule 60(b) F.R. Civ. P., setting forth, in part, the transactions leading up to and culminating in the dismissal order. On December 13, 1974 the District Court (Judd, D.J.) issued an order reopening the case, except as to defendants Miller, Thomas and Ollins.

Plaintiff appealed from the order insofar as it failed to reopen as to three of the named defendants Alan Miller, M.D., Gerald Ollins M.D., and Alexander Thomas, M.D. The decision of the Court was to reverse the order of Judge Judd and reinstated the action as to two of the above defendants since plaintiff had withdrawn her action against Thomas. This opinion is reported at 517 F. 2d 1337. The case then proceeded to trial against all the remaining defendants on the issue of the alleged unconstitutional medication of plaintiff while at Bellevue and Central Islip Hospital. At the conclusion of the plaintiff's case the Court Judge directed a verdict in favor of defendants O'Neill and Miller. After hearing all the testimony the jury returned a verdict in favor of all the defendants' including two defaulting defendants. The

Court (Judd, J.) reserved decision as to the assessment of damages as to the defaulting defendants. The Court also denied plaintiff's motion to set aside the verdict.

Plaintiff, after approximately a years worth of extensions in filing her brief moved in the United States District Court for the Eastern District to set aside the verdict based on alleged missing portions of the transcript. The motion was denied (Mischler. Ch. J.). The instant appeal is from the denial of both motions to set aside the verdict.

### Trial

At trial the New York State Attorney General's office represented only Dr. Alan Miller, Commissioner of Mental Hygiene, Dr. Eugene O'Neill, Director of Central Islip State Hospital, Dr. Dromgoole and Dr. DaCorta both from Central Islip Hospital. After the opening statements of counsel, plaintiff's counsel introduced and read to the jury the plaintiff's medical records while at Bellevue and Central Islip and none of these records with the exception of two were made by or bore the signature of any of the State defendants. See p. 27-62. Plaintiff then presented her witnesses.

### Dr. Wood

Wood testified that he is an Episcopal Priest and a psychiatrist. The doctor testified that he had read the plaintiff's hospital records from Bellevue and Central Islip as well as plaintiff's deposition.

On direct examination, Dr. Wood testified that he could ascertain from the hospital records whether plaintiff was given drugs over her objection (p. 73).

He then said the standard method of administering psychoticpic drugs in mental hospitals in 1968 would be by mouth or by injection if a patient was unmanageable or dangerous to themselves (p. 75).

In his opinion there was no evidence in the hospital record that plaintiff was "acutely agitated", from the first description of the patient and the remarks attributed to the patient (p. 76). There was nothing in his opinion showing a need for the use of intramuscular medication (p. 77).

Dr. Wood then testified that an excessive amount of thorazine can cause loss of consciousness, coma or lower blood pressure (p. 78). In his opinion plaintiff was not given a physical examination prior to the injection of the drug while at Bellevue (p. 79). A medical examination prior to medication would give an indication of physical well-being of patient and potential adverse effects of the medication if the patient had kidney disease for example (p. 79).

The witness also read from the Central Islip

State Hospital record of May 14, noting that the plaintiff
suffered a physical reaction from the psychotrophic drugs
she was given there (p. 81). Based on the hospital records,
the witness could not conclude the drugs were necessary to
protect the patient from herself or save her life (p. 84).

The doctor testified that in 1968, there were alternative forms of treatment besides medication such as nursing care or group therapy (p. 85) which could have been administered.

The doctor testified that in his opinion a supervising psychiatrist in a mental hospital is responsible for the residents and nursing staff on the floor, for knowing who has been admitted and how patients are being treated medically, and for reviewing the records of the patients on his ward (p. 88).

He also thought that as of 1968, it would be standard practice for psychiatrist to examine a patient's hospital record before diagnosis. In a good relationship, the patient will speak up if he has a good reason to object to treatment (p. 89). It would also be relevant to consider a patient's objection on religious grounds (p. 90).

The doctor testified that there is evidence in the Central Islip Hospital records that "plaintiff is a Christian Schentist, medicine is against her religious practice." (p. 92).

The doctor stated that any irrational behavior, or indications of anger or hostility were "not necessarily indicative of severe mental pathology" (p. 93). They may be consistent with the beliefs of someone adhering to the tenets of Christian Schence (p. 93). Religious beliefs are a

significant part generally speaking, of a person's identity, and when they are violated, it is an attack on that person (p. 94). The witness's stated that his source of information about Christian Science is the Mary Baker Eddy book on Christian Science and his personal relationships with Christian Scientists (p. 96).

The doctor testified that the effect on the plaintiff of a violation of her religious beliefs during the 10 weeks she was in the hospital would be difficult to determine based on the hospital records (p. 101).

Dr. Wood then testified based only on the hospital records that the medication administered was not likely to improve her mental condition (p. 102).

Dr. Wood thought that mental anguish could be a reasonable result of the violation of her Christian Science beliefs based on certain assumptions about the plaintiff (p. 104).

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The sole injection given Miss Winters at Bellevue Hospital was on the night of May 2, and Dr. Ollins saw her according to the record for the first time on May 7 (p. 109).

Dr. Wood stated that testimony about a hospital procedure is not based upon any detailed knowledge of the occurrences and procedures at Bellevue in 1968 (p. 110).

From the record without professional visits, the Doctor determined much of plaintiff's mental suffering stemmed from the fact she did not want to be hospitalized. She was also upset about the medicine (p. 114).

Dr. Wood could find nothing directly in the plaintiff's chart about her mental suffering (p. 116). There is only indirect evidence from the plaintiff's behavior described in Dr. Blankfield's report (p. 116).

The general procedure is to prescribe any medication after diagnosing and admitting a patient. There is absolutely nothing to suggest medication was given before Dr. Blankfield interviewed patient (p. 117).

The medication was given at 8:40, substantially after examination by Dr. Blankfield and his psychiatric diagnosis (p. 118).

The doctor stated that it is safe to assume that an admitting psychiatrist in an emergency room, such as Dr. Blankfield, would take as much time as he felt necessary to interview a proposed admission like Miss Winters (p. 123).

Although he testified he felt the dosage given at Bellevue was excessive, Dr. Wood could not say Dr. Blankfield did not feel it was justified and did not believe it was a necessary and proper dosage (p. 125) under the circumstances.

Dr. Wood stated that he had never been to Central Islip Hospital, and was not intimately familiar with the organization and staff duties at the hospital (p. 133-134) nor had he ever seen the entire hospital records before coming to court (p. 133).

The doctor admitted that the thorayine relaxes tension in a chronic schizophrenic, it would be normally beneficial to use it before starting alternative forms of treatment such as therapy or counseling (p. 139-140).

### Dr. Messinger

Dr. Messinger testified that he is a psychiatrist. He testified that he had examined plaintiff's hospital records which indicate that she had been given medication after expressing a religious objection (p. 178). The records also reflected that plaintiff had been given major tranquilizers otherwise known as anti-psychotic agents three or four times a day (p. 179). One of the drugs was Thorazine. In describing the possible side effects of Thorazine which the doctor stated are magnified if a patient is elderly and female, the doctor explained that one of the most common effects is drowsiness. Sometimes one can feel depression (p. 180-181, 183) or a more serious effect jaundice (p. 182). In asking whether defendant Dr. Blankfield could calculate the risk of Thorazine the doctor stated that the effects on an individual cannot always be determined but is minimized

by a physical examination (p. 184-185). The doctor further testified that the record revealed that plaintiff had some side effects of the drug. (p. 185-186). The doctor testified that the records indicated that plaintiff was a paranoid schizophrenic (p. 189).

In his medical opinion the doctor felt that when the plaintiff entered Bellevue he would not have given the plaintiff drugs (p. 191) and that being given drugs after she objected would cause her anxiety and agitation (p. 198). The doctor admitted on cross examination that he had never met the plaintiff (p. 202). The doctor further admitted that his opinion was based on the written record and he did not know what the particular doctors had experienced but assumed they would be making a medical diagnosis or impressions (p. 204-205). The doctor further admitted that he had not seen the verbatim transcript of the examination conducted on the plaintiff, nor had he seen any films of a psychiatric interview with Miss Winters

(p. 232). The doctor also testified that Thorazine was a well recognized drug (p. 206) and very often used in the treatment of schizophrenics (p. 216). The doctor further admitted that most psychiatrists resort to drugs first (p. 220). The doctor stated that a symptom of some schizophrenics is religiousity that is a per occupation with religion (p. 230) or litigousness (p. 231).

### Dr. John Kliever

Dr. Kliever testified that after looking at Miss Winters' hospital records and a single interview with her over the phone in 1975, he ascertained or believed that there was evidence that plaintiff was given medication against her Christian Science beliefs in 1968 (p. 325).

Based only on his perusal of the records, there were other alternative means of treatment available aside from drugs in 1968 (p. 327). He concluded that the way in which the drug was administered was a "painful attack" on Miss Winters, and could not have been therapeutic in this situation (p. 329).

On cross-examination, the witness conceded that after reviewing the file and the actions by the examining physicians with regard to Miss Winters, it is fair to say there was nothing in the file to lead him to conclude they were not doing what they thought best for the patient (p. 334).

Nor does Dr. Kliever think it would be possible for anyone else to conclude they were acting in any way but what they thought best (p. 334).

Dr. Kliever would not concede that he was disagreeing with the conclusions of the examining physicians by claiming the psychological impact was harmful to the patient (p. 334).

Kliever did admit that it would be "a big advantage" for examining physicians in deciding how to treat patient, "to have actually seen Miss Vinters and to actually see her mental condition in 1968." (p. 335).

He admitted that it might well be that her psychological condition in 1975, when Kliever interviewed her on the phone, was greatly different from that of May, 1968 (p. 335).

### Mirian Winters

Plaintiff Mirian Winters testified that in May of 1968 she was taken to Bellevue Hospital. At Bellevue plaintiff stated that she had refused to have her blood pressure taken stating that she believed and relied on Christian Science for any treatment she might need. Plaintiff stated that the doctor went away with a knowing smile. She testified that she was then taken upstrirs, thrown across the table and injected in the buttocks (253) Plaintiff claimed that evertime they went to give her tranquilizers she objected. She testified that she told two psychiatrists whose names she could not recall that she believed in Christian Science and did not believe in medication (261). She further stated that every time she saw the psychiatrist she asked them why she was being forcibly medicated (263). After the first injection she felt strange and felt sick (271-272). She further testified that the psychological effect was devastating (276). Plaintiff also stated that she saw an attorney and was told she could go before a Judge or stay there voluntarily.

Plaintiff stated that she chose the lesser of two evils (264). Plaintiff testified she was taken to Central Islip Hospital. She told the nurse there that she believed in Christian Science and was relying upon that for her treatment so therefore did not want medicine or drugs forced upon her (264). Plaintiff further stated that she talked of her beliefs with every doctor as well as everyone else and told them it was an outrage and a terrible thing (265). While at Central Islip plaintiff testified that she was constantly being "medicated, inoculated, vaccinated, probed and everything else (265). She recalled receiving two anti-tetanus and one smallpox injection. She testified that the smallpox injection caused a terrible cough which was healed in Christian Science (265). Plaintiff also testified that she objected to her photograph being taken (266). Besides injections plaintiff testified that at Central Islip she received tranquilizers several times a day and objected to taking them each time (267-268). Plaintiff explained that she had become interested in Christian Science approximately fifteen years ago (278). Plaintiff testified while that at Central Islip she was not allowed to attend Christian

Science Services (276) and was shocked and sickened after receiving injections (277). Plaintiff stated she brought her religious objection up to everyone but did not recall whether she had specifically discussed her objection with Dr. Dromgoole (279). Plaintiff explained that she had been living at the Hotel Pierrepont and needed a medical approval to get a room with a private bath. Plaintiff stated that she therefore choose the lesser of two evils a psychiatrist instead of a medical doctor. (p. 284). Plaintiff testified that this was her biggest mistake since the psychiatrist wrote up an adverse report and later returned with an investigator (285). Plaintiff admitted that in 1930 she had been treated for a physical disorder at St. Lukes hospital (287). Plaintiff further admitted that after her release from Central Islip Hospital she voluntarily went to Long Island College Hospital because she had a terrible breathing problem (288). Plaintiff admitted taking the medication which they had given her twice a day. (313). She felt she needed medication but wanted to rely on Christian Science (289). Plaintiff denied ever having been vaccination and denied that the doctors at Bellevue had

found a vaccinating mark on her calling that statement a "damnable lie". Plaintiff testified that the first time she was vacinnated was at Central Islip Hospital (299). Plaintiff testified that while at Central Islip Hospital two Christian Science representatives came to see her. Also while at Central Islip plaintiff spoke on the phone with two friends Mr. Ripple and Mrs. Butler. Plaintiff on cross examination denied being granted a honor card and being allowed freedom of the grounds (304-305). When asked whether she knew defendant Dr. O'Neill the director of Central Islip Hospital and plaintiff indicated that she didn't think so. The doctor was then asked in open Court to stand up and plaintiff when asked whether she ever complained to him plaintiff stated that she did not recall complaining to him (305). Plaintiff only recalled talking with Dr. Jordan and being given salve for her feet because she suffered from severe blisters. However plaintiff denied asking for such treatment (306). Plaintiff also denied requesting voluntary status on June 18, 1968 stating that her signature was a technicality and her sight was affected this being one of the symptons of shock (307-308).

### Dr. Miller

Dr. Miller testified that he has worked for the Commission of Mental Hygiene from 1966 to 1975. As Commissioner he was authorized to issue regulative policy to the hospitals under the Department of Mental Hygiene (445) which contains approximately 110,000 patients (447). He testified that there was a problem with involuntary patients objecting to treatment particularly in psychiatric practice and that in 1966 the Mental Hygiene Law was in the process of recodification (451). When asked when he first became aware that there was a right of a patient to object to medical treatment on religious grounds in a mental hospital the doctor indicated that it was in 1971 in connection with the instant lawsuit (460). The doctor testified that he had met with the Chaplin's Association concerning religious needs of patients for example the availability of religious services. The doctor testified that he cannot recall any occasion during these meetings that a problem of compelling treatment against a religious objection was raised (463). The doctor further testified that the first time he ever heard of Miss Winters, was sometime between 1969 and 1971. The doctor stated that

he at no time received a complaint letter or legal document from the plaintiff concerning the fact that she was being treated against her religiou. Objections (464). The doctor stated that as Commissioner he did not promulgate any regulations which required that a patient not be treated over an objection because the State Legislature was involved in recodifying the Mental Hygiene Law and was in the process of writing regulations to implement the law (471). Moreover, the doctor testified that he knows of no other individual before or since plaintiff who objected to medication on religious grounds (473).

### Dr. Francis J. O'Neill

Dr. Francis J. O'Neill testified that in 1963 he was the Director of Central Islip State Hospital and that his duties were that of Senior Administrative Officer of the hospital (347). The doctor testified that in 1968 he had no recollection of any specific Christian Scientist patients in the hospital at that time although he heard from time to time the hospital did have patients who were Christian Scientists (350). The doctor testified that he instituted the program in which religious services were provided for Christian Scientists (352-353) and they were not prevented but encouraged to go into the ward and talk to the patients (399). When asked about his experience with Christian Scientists, Dr. O'Neill testified that his neighbor was a Christian Scientist and he had obtained medication for a neighbor's child. Moreover, in his other meetings with Christian Science practitioners at the hospital no one had raised the matter of any objection to medication (354). He had heard that Christian Scientists do not take medication, however, he was not sure it was a tenant of their religion. (354). When asked the doctor testified that it would be very rare for the Bellevue records other than the legal commitment papers to accompany a patient to Central Islip (256).

The doctor further testified that during the course of his administration he never had a Christian Scientist bring to his attention the fact that the administration of medical treatment whether it be drugs, regiment or counseling was contrary to his or her beliefs (367) nor had he received one complaint by a Christian Scientist about being given medication (399). Moreover, during the time plaintiff was at Central Islip hospital he never had occasion to see her file and never had occasion to see her (392). The doctor explained that the policy of the hospital concerning intramuscular injections was that it had to be ordered by a physician and either given by a physician or nurse and that the administration of medication was generally the responsibility of the psysician rather than the psychiatrist (391). The doctor testified that a resident psychiatrist would confer with a supervising psychiatrist concerning the care and treatment of patients (415). Finally at plaintiff's Exhibit 2 which is Miss Winter's file at Central Islip he could see no indication of malice or prejudice towards plaintiff on the part of any of the doctors who treated plaintiff (393). The doctor further testified that he himself had no feelings of malice towards the plaintiff (394).

### Dr. Dromgoole

Dr. Dromgoole testified that she is a psychiatrist educated in Ireland and England. She came to the United States in 1951 and repeated her five years of residence and then joined the Staff of Central Islip Hospital (551-553). In 1968 she was one of the Supervising Psychiatrist along with Dr. Dacorta with two senior psychiatrists in charge (553-554). She testified that her duties were admissions and discharge of patients. In addition the doctor testified she carried a case load of about forty patients doing mental examinations and social histories of each patient (554). Dr. Dromgoole testified that during plaintiff's hospitalization at Central Islip plaintiff was not one of the doctor's forty patients and that she had no personal recollection of plaintiff except that the hospital record indicated that she discharged the plaintif (555-556). The record further indicated that she had seen plaintiff on July 17, 1968 and reading the note it stated that plaintiff's first admission was on May 13, 1968 and she was converted to a voluntary status on June 18,. She had been admitted because she was confused and unable to take care of herself. She had expressed persecution ideas and had adjusted well to hospital routine. The note also indicated that plaintiff

was a Christian Scientist in religion, however, she takes her medication and there is no problem at all with adjustment. The note further read discharge from custody is approved (556). The doctor testified that she did not recall the note but it contained her signature. Moreover, she did not recall prescribing any medication for her and that medication was usually administered by the physicians rather than the psychiatrists (557). The doctor testified that her name did not appear on plaintiff's medication sheet (558). She testified that upon discharge, if a patient asked for medication she might be given some (561).

## POINT I

THE JURY VERDICT IN FAVOR OF THE FOUR STATE DEFENDANTS, MILLER, O'NEILL, DACORTA AND DROMGOOLE WAS ENTIRELY PROPER AND MUST STAND.

On a contrived legal theory which attempts to cloud the fact that the testimony at trial was not even remotely sufficient for a finding of liability of the defendants, plaintiff seeks to overturn a valid jury verdict entered in favor of all defendants. A review of the testimony unequivocally demonstrates that the jury returned a verdict for the four state defendants O'Neill, Miller, DaCorta and Dromgoole, not because of any alleged shifting of the burden of proof, or alleged failure to follow the law of the case, or because of any prejudicial remarks or the jury charge, but because plaintiff failed to present one iota of evidence that these state defendants were in any way liable for any of the acts alleged in the complaint. Thus the legal theory, upon which the plaintiff seeks reversal of the verdict does not apply to these defendants. Rather it is settled law that plaintiff must show that the verdict was clearly erroneous. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). See

Rule 52 of the Federal Rules of Civil Procedure. Plaintiff has entirely failed to meet this burden.

Plaintiff failed to show that defendant Miller and O'Neill even knew of plaintiff's existence or her alleged objection to taking medicine or should have known. Moreover, plaintiff failed to offer any proof that any of the State defendants administered any medication whatsoever to plaintiff or knew or should have known of her alleged religious objections to such medication. Plaintiff (brief, p.5) totally ignores the testimony adduced at trial because not only did she fail to show that the verdict was clearly erroneous but she also failed to present any evidence against the State defendants.

Rather plaintiff argues that the Court shifted the burden of proof by not following the law of the case. Specifically, plaintiff alleges that the Court put in issue whether it is permissible for a physician to substitute his judgment for that of a mental patient. A review of the record reveals that at no time did the Court permit the proof to revolve around that issue. It was clearly stated in the Judge's charge to the jury "that a finding of mental

illness even by a Court does not render a patient incompetent or unable to manage her affairs." The Court further stated that "the law provides that administering drugs to a sick patient would violate a patient's rights under the Constitution even if they would benefit the patient or improve her mental condition (p. 671).

Nowhere does the judge attempt to state that administering drugs to plaintiff was permissible or would be because of her mental illness. Moreover, the State defendants never even attempted to raise this issue as a defense; rather, they claimed that they did not commit the acts alleged and that they had absolutely no knowledge of such acts. Rather, through the testimony of plaintiff's own witnesses she attempted to establish that plaintiff was given medication wrongfully, that she was competent to object to such medication, and that her objection was based on religious grounds. These issues were not raised by the defendants or the Court.

A review of the evidence amply supports the verdicts in favor of the four defendants. Dr. Miller was sued for being the Commissioner of Mental Hygiene during the time period that plaintiff was treated at Central

Islip hospital. The doctor unequivocally testified that he did not know of plaintiff's existence in 1968. He did not know of the existence of any patient in the hospitals under his supervision who was a Christian Scientist or who objected to medication on such grounds (p. 463). This lack of knowledge was understandably believed since a Commissioner cannot be expected to know the existence or the problems of each and every patient out of the 110,000 patients under his jurisdiction. Moreover the Commissioner testified that until he learned of the instant lawsuit which was years after plaintiff had left Central Islip he had never heard any complaint that a patient was being treated against his or her religious beliefs (p. 460). Moreover the doctor testified that there was a Mental Health Information Service where a patient could complain and a Chaplains' Association, with which he met regularly, to discuss the religious needs of the patients (p. 463). Nowhere in plaintiff's case was she able to offer proof of knowledge or liability on the part of this defendant.

Plaintiff in her brief makes much of the fact that the Court would not allow in evidence a memorandum written in 1971 which purportly showed that in 1971 after the defendant was aware of this lawsuit nothing was done about religious objections to treatment. It should be first noted that this memo is not in evidence and thus its original contents other than plaintiff's characterization remains unclear. Moreover, the Judge properly excluded a memorandum written three years after plaintiff was at Central Islip Hospital. It is irrelevant what he knew or did three years later. Moreover proof that if a person had known of a situation he would not have acted is of no value when there is no proof that he had knowledge of the situation. Further, the defendant testified that for years the involuntary patient had been an issue of debate and disagreement among psychiatrists (p. 466).

Finally the defendant explained that regulations concerning mental patients' right to object to treatment took so long to be issued because the legislature was in the process of recodifying the Mental Hygiene Law and writing regulations which involved the state legislature as well as the medical community (p. 470-471). Thus the verdict in favor of the above defendant was clearly proper.

The evidence against State defendant Dr. Francis J. O'Neill as Director of Central Islip Hospital was equally meager. The doctor testified that he had no recollection of any specific Christian Scientist patients in the hospital during the time of plaintiff's stay (p. 350). During the course of his administration he had never had any complaints by a Christian Scientist that any form of medical treatment was being given over religious objections (p. 399). Further in his experience with people who were of the Christian Scientist faith these people did not object to medication (p. 354). The doctor testified that religious services were provided for patients who were Christian Scientists and the ministers were encouraged to go on to the wards and talk to the patients (p. 399). The doctor explained that the hospital policy concerning injections was that they had to be prescribed by physicians in charge of the general care of patients (p. 419). Plaintiff was unable to present any proof that this defendant knew of plaintiff, had seen her records, had administered any medication or even knew that any medication was administered or finally that she had objected to such. In fact the plaintiff herself testified

that she did not know this defendant and did not recall ever complaining to him (p. 305). Thus the jury did not charge this defendant liable for his lack of knowledge of a particular patient.

The next State defendant was Doctor Dromgoole, a Supervising Psychiatrist at Central Islip Hospital. She testified that their duties in 1968 were admission and discharge of patients. In addition, the doctor carried a caseload of forty patients which entailed mental examinations and social histories of the patient. During the time of plaintiff's hospitalization plaintiff was not one of her patients (p. 553-554). The doctor had no personal recollection of plaintiff. She did not recall ever prescribing medication or that plaintiff objected on religious or any grounds to the medication. Further plaintiff's name did not appear on her medical sheet (p. 558). The only proof that Doctor Dromgoole had any contact with the plaintiff was a hospital record which indicated that the doctor interviewed the plaintiff to determine discharge and recommended her discharge from the hospital (p. 556). The doctor's name did not appear on any of the other hospital records. The verdict in favor of this defendant was consistent with the weight of the evidence.

The verdict in favor of the fourth State defendant was equally proper. The defendant Dr. DaCorta was also a supervising psychiatrist during the time plaintiff was at Central Islip. Hospital. The doctor apparently was unable to come from Oswego to New York and therefore did not testify (p. 581). However, the only evidence which plaintiff presented that Doctor DaCorta had any contact with the plaintiff was on two hospital records. In the first record the doctor certified that plaintiff had changed her status from involuntary to voluntary. The document contained a statement that he examined the above named patient and confirmed the need for medical care and treatment for mental illness. The document checks the box for female but did not fill in the blanks for social security number, ethnic background or religion. The last box for legal status was checked voluntary (p. 583). The only other record his name appears on was a letter to Dr. Jacob, Department Director, stating that plaintiff has been released and to make arrangements for her transportation (p. 587). Nowhere in the medication sheets or any of the other records does this defendant's name or any of the other four defendants name appear.

Finally, it should be noted that plaintiffs were provided with the entire hospital record of plaintiff which was read to the jury (See p. 27-62) and which the jury had during its deliberation.

Thus it can be seen that plaintiff's legal theories do not apply to the above defendants. Looking at the evidence in a light most favorable to the plaintiff the verdict in the case at bar could never be deemed clearly erroneous. There is no proof that the State defendants ever stated that it was legal to administer medication to plaintiff over her religious objection. On the contrary, they testified that they were not involved and did not have knowledge of any of the alleged acts. The jury obviously agreed with these defendants and its verdict must stand.

It is also important to note that plaintiff misconstrues the effect of and the ruling of this courts. earlier reversal of the District Court grant of Summary Judgment to the defendants. See Winters v. Miller, 446 F. 2d 65 (2d Cir.) cert. denied 404 U.S. 984 (1971). The defednants in the District Court had moved to dismiss plaintiff's complaint. The Court (Travia, J.) treated this

motion as a motion for summary judgment and granted the relief. At the time the motion was appealed no testimony nall been taken. This Court found in essence that plaintiff stated a cause of action and remanded the case for trial. Even assuming arguendo this court ruled that her constitutional rights were violated the issue of who if any of the defendants violated her rights and if there existed a defense of good faith as well damages still had to be determined. The case was not remanded just to assess the amount of damages. The Court in its decision merely stated at 71 "that having concluded, therefore, that the appellant has stated a claim on which relief may be granted. We remand the case to the District Court with instructions that it proceed to trial in the merits."

## POINT II

THE TRIAL COURT'S EVIDENTIARY RULINGS AND JURY CHARGE WERE ENTIRELY PROPER. IF ANY ERROR WAS COMMITTED IT WAS NOT OF SUCH A NATURE TO OVERCOME PLAINTIFF'S LACK OF EVIDENCE AND WARRANT A REVERSAL OF THE JURY VERDICT.

The specific evidentiary rulings made by the Trial Court which plaintiff objects to were entirely proper.

If we assume, solely for purposes of argument that they were incorrect, they were relatively unimportant and would not be of such a nature as to warrant reversal of the verdict.

The first ruling which plaintiff objects to is the refusal of the Court to allow Dr. Wood one of their three expert witnesses to rely on plaintiff's deposition for his opinion testimony. The Court restricted the doctor reference to the hospital records because the plaintiff had not yet testified and due to this doctor's appointments he was testifying first. The Court stated that after the plaintiff testified the doctor could then give his opinion concerning her testimony in the deposition (p. 70-73). The plaintiff obviously did not think such opinion testimony was important enough to recall or even request to recall the doctor after the plaintiff had testified. Moreover a review of this doctor's testimony as well as that of plaintiff's other witnesses amply demonstrates how much leeway the Court gave to the plaintiff. Based on the hospital records her witnesses gave their opinion on every conceivable issue in the case including plaintiffs physical suffering, psychological suffering and religious beliefs.

Next a review of the record shows that the Trial Court properly struck answers on two occasions as unresponsive. The two occasions which plaintiff refers to are as follows. The witness Dr. Messinger was asked the following question:

"Q. Would you be then -- could you then form an opinion on the possible traumatic after-effects that a patient like this could be expected to suffer.

A. Yes. In fact in the Central Islip record she repeatedly stated her distress at getting the medication. "

It is respectfully submitted that when one is asked for an opinion and responds with a statement made by another person this is not responsive.

The next question involved the following:

"Q. Dr. Messinger, if all there was was the evidence which you have before you in the record, could you form an opinion about whether she was in need of immediate treatment at the time she

was in need of immediate treatment at the time she entered Bellevue?

A. Yes.

Q. What would that opinion be?

A. The opinion would be that -- about the last thing that I would do would be to give her drugs.

MR. WEILER: Your Honor, he dropped his voice and I don't know --

A. (Continuing) The last thing that I would do is give her drugs.

MR. WEILER: Your Honor, that is not an answer to the question.

The question was, whether she needed attention, not whether she needed drugs.

Therefore, I move to strike the answer.

MR. GASSEL: I believe the question was whether she needed treatment in the form of drugs.

THE COURT: I did not understand that.

I will let the answer stand. I do not think it is responsive.

MR. GASSEL: Thank you." (Emphasis supplied).

It should be noted that contrary to plaintiffs claim and even though the answer was not responsive the Court let the answer stand. Next plaintiff objects (Br. p. ) to the Court's comment concerning a witness's comparing plaintiff's possible psychological trauma to the trauma of a woman who was violated sexually or an Orthodox Jew or Moslem who was forced to eat pork. The Court remarked that at least one of these examples was extreme. This remark is certainly proper.

Finally plaintiff claims that the Court

was confused as to the time period for which plaintiff was claiming damages. It is respectfully submitted that the confusion was that of plaintiff and her counsel as to her claim.

Plaintiff further claims that the Trial Court allowed in the record prejudicial and irrelevant evidence. As examples of this plaintiff claims that she should not have been questioned about the events which led to her commitment, previous attempts at commitment, and letters she had written to politicians. Plaintiff in essence claims that the trial court should have barred all of her cross-examinations.

This is just not realistic, since the plaintiff chose to take the stand, the fact that she had been committed or had been argumentative or litigious became clearly permissible areas upon which to attack her credibility as a witness.

Next plaintiff finds fault with much of the Court's jury charge. The plaintiff's argument that the Trial Court failed in its charge to follow the law of the case

in the jury charge has been answered in Point I of this brief (supra).

Further a review of the charge reveals that, contrary to plaintiff's allegations, the charge did not tell the jury that plaintiff must prove that her constitutional rights were violated. Moreover the Court did not tell the jury that a physician might assume a patient is incompetent and discount her objections. The following relevant portions of the charge amply demonstrate that the charge was proper.

The court told the jury that "the question relates only to damages suffered or which she may have suffered by being forced to take medication while she was in these two hospitals" (671). The court never indicated that plaintiff, if mentally ill, could not object to medication or that such mental illness would justify any forced medication. In fact the court clearly stated (p.672):

"And the law in New York is that a finding of a mental illness, even by a Judge and a Jury and commitment to a hospital doesn't prove that the patient is incomcompetent or unable to manage herself or her affairs.

". . . the law provides that administering drugs to such a patient would violate the patient's rights under the constitution, even if they would benefit the patient or improve her mental condition." (p. 672)

Again at (683) the Court stated that "the fact that plaintiff was in a mental hospital does not mean she is incompetent to testify".

Further, the Court's charge on the liability of each defendant and the defense of good faith was accurate and clear. The Court stated that (p. 673):

"So you can take the law to be if the plaintiff was forced to take medication and if it violated her religious beliefs and you believe her constitutional rights were violated, then it is for you to determine first whether one or more of the defendants sued in the case subjected or cause her to be subjected to a violation of her rights, and second whether they have a defense of good faith in this case.

In order for the plaintiff to recover money damages she has to establish by a preponderance of the evidence first that one or more of the defendants had some degree of personal responsibility for the violation of plaintiff's constitutional rights and second that those violations directly or approximately caused any physical or non-physical injury that she may have suffered".

Plaintiff fails to note that, even if a violation of her rights was assumed to have occurred, plaintiff still had to prove that each of the particular defendants were the persons who committed such violations. The Court even stated that for the defendants to be liable they need not have known plaintiff or known she was in the hospital (674).

Moreover, in regard to the defendants in a supervisory capacity, such as Dr. Miller and Dr. O'Neill, the Court correctly charged that they need not have known plaintiff or of her alleged deprivation, but liability could be found if they should have known of the situation or failed to take steps to prevent it (p. 674). Moreover, the Court charged that liability could be found where a "boss" is responsible for his subordinates (674). Indeed, as plaintiff admits (Br. p. 26), the Court even charged the jury on the holding in Wood v. Strickland, see (pp. 676, 708).

In regard to the other two state defendants the Judge correctly charged the jury concerning Dr. DaCorta stating that he supervised the doctor who administered the medication

several times. He noted that he was not there to testify and that the jury could not guess at what he would have said, but must consider the record (p. 689).

Likewise, the charge concerning Dr. Dromgoale was accurate in that he explained that she discharged the plaintiff (689).

The propriety of the charge is amply demonstrated where the Court clearly charged on liability of defendants, the issue of forseeability and the good faith defense as follows (709):

"So the burden is on the defendant to prove each element of defense by a preponderance of the evidence. The plaintiff need not show the defendants acted with malice or ill will or in bad faith to prove her claim. To establish a good faith defense, the defendants must prove, by a preponderance of the evidence first, that his act was performed within the scope of an official function, second, that at the time he did not know or had no reason to know he was violating a constitutional right of the plaintiff, and third, that he did not act with malice, meaning a specific intent to cause injury or to violate plaintiff's rights.

There can be no real question but that the charge on foreseeability was entirely proper considering that defendants were not constitutional lawyers but doctors and especially since at the time in question there was testimony

that there was much dispute among psychiatrists as to involuntary treatment.

Moreover, plaintiff in support of her claim that the settled law at that time was that a mental patient could refuse treatment cites an Illinois and a Ninth Circuit case. (Brief, p. 29 n. 97). To expect the defendant doctors to be aware of such cases even if they were controlling is incredible.

It should also be noted plaintiff has wholly failed to demonstrate that at trial plaintiff objected to these particular charges. Thus the courts charge which must be taken as a whole was clearly prope. and is not subject to criticism. Cupp v. Naughton, 414 U.S. 141 (1973).

A review of Point III of plaintiff's brief reveals that once again plaintiff has taken the shot-gun approach, hoping that if not one claim, then the sheer number of claims might disuade the court from looking at the lack of her evidence at trial.

In response to plaintiff's allegation of apparent hostility the record speaks for itself. Judge Judd at all times conducted himself and his Court in the utmost judicial

manner, especially during plaintiff's wandering and unresponsive testimony. Likewise the Court's comment on the possible individual liability of the defendants was proper and true since they were sued individually. Moreover, the comments concerning the plaintiff's requested strict standard and the presence or absence of the plaintiff and the defendants at trial applied equally to both sides and was not erroneous. Finally plaintiff's objections to the defense attorneys' summations to the jury are also meritless. Lawyers are traditionally given some leeway in their summation, which like the charge, must be taken as a whole. Upon a careful review of these summations one cannot find even a marginal, let alone reversible error in any of these statements.

## POINT III

THE DENIAL OF PLAINTIFFS' SECOND MOTION FOR A NEW TRIAL WAS IN ALL RESPECTS PROPER

The Court's denial of plaintiff's second motion for a new trial which was based on alleged missing transcripts was in all respects proper. The missing portions of the transcript apparently concern only voir dire examinations and pretrial bench conferences (Exhibit 1 to motion). Thus nothing is missing that could prevent an analysis of the integrity of the trial itself.

Plaintiff admits in her motion papers that a new trial will not be granted solely on the grounds that transcripts are unavailable. However, plaintiff claims the missing portions contain errors of substantial proportions, and refers to alleged errors, contained in her original motion for a new trial.

With respect to the alleged missing transcripts of the <u>voir dire</u>, plaintiff's own exhibit 3 to her instant motion showed that it was not the customary practice to transcribe jury <u>voir dire</u> in civil cases. In fact the <u>voir dire</u> questions concerning a juror's attitude towards mental illness, which the Court disallowed were not necessary to a fair trial. Moreover the Court's denial would never warrant reversal of the jury's verdict.

Nowhere does plaintiff even attempt to spell out what is so crucial about the <u>voir dire</u> here. These unsubstantial claims cannot possibly justify a new trial. Moreover, all the <u>voir dire</u> questions which plaintiff alleges the Judge erroneously disallowed were available and were attached to the Affidavit in Opposition of George A. Weiler, Deputy Assistant Corporation Counsel of the City of New York. Thus this appellate court can amply rule on the propriety of those questions.

Finally in regard to the pretrial proceedings where plaintiff alleges an improper shifting of the burden of proof, these minutes are not missing. Moreover, as noted earlier, plaintiff is incorrect in asserting that the Court erred in putting the burden of proof on plaintiff. Plaintiff always bears the burden of proof. This Court did not hold as a matter of law that plaintiff's right had been violated. It held only that plaintiff's complaint stated a cause of action and remanded the case for trial. See Winters v. Miller, 446 F. 2d 65.

## CONCLUSION

Plaintiff makes much of purported or at best marginal errors in her trial. Yet plaintiff repeatedly ignores the fact that she failed to prove her case as against the State defendants. Due to the apparent lack of evidence, the jury returned a verdict in the defendants' favor. This verdict was proper and should not be termed clearly erroneous. Counsel attempts to envoke sympathy for the plaintiff by drawing an analogy to the

horrors described in Solzhenitsyn's Cancer Ward. The analogy while dramatic is not accurate. The State Hospitas was not Cancer Ward. This is not Russia. Here plaintiff has had her day in court with the aid of competent counsel and her claim was tried by a jury of her peers. She has presented her evidence, she has testified. The jury did not find liability and the verdict should stand.

Dated: New York, New York May 16, 1977

Respectfully submitted,

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STATE OF NEW YORK : SS.: COUNTY OF NEW YORK , being duly sworn, deposes and says that he is lapla thin the office of the Attorney General of the State of New York, attorney for herein. On the day of the annexed upon the following named person : Logal Service of 2095 Broaden Attorney in the within entitled Q\_ a true and correct copy thereof, properly enclosed in a postpaid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by for that purpose.

Assistant Attorney

of the State of New York